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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 CAMERON MITCHELL and ROBERTA
7 MITCHELL, husband and wife,

8 Plaintiffs,

9 v.

10 WERNER COMPANY, a Delaware
11 corporation; and W.W. GRAINGER,
12 INC., an Illinois corporation,

13 Defendants.

14 CASE NO. C11-5543BHS

15 ORDER DENYING MOTION
16 TO AMEND

17 This matter comes before the Court on Plaintiffs Cameron and Roberta Mitchell's
18 ("Mitchells") motion to amend complaint (Dkt. 16). The Court has reviewed the briefs
19 filed in support of and in opposition to the motion and the remainder of the file and
20 hereby denies the motion for the reasons stated herein.

21 **I. PROCEDURAL HISTORY**

22 On July 15, 2011, the Mitchells filed a complaint against Defendant Werner
23 Company ("Werner"), alleging negligence and strict liability for injuries suffered by Mr.
24 Mitchell. Dkt. 1. On August 11, 2011, Werner answered and asserted numerous
25 affirmative defenses, including the defense that Werner was currently involved in a
26 bankruptcy proceeding. Dkt. 6.

27 On November 22, 2011, the Court issued a scheduling order that, among other
28 things, set the deadline to add additional parties as December 22, 2011 and the deadline
for amended pleadings as January 3, 2012. Dkt. 8.

On January 10, 2012, the Court granted the Mitchells leave to file an amended complaint. Dkt. 10. On January 11, 2012, the Mitchells filed an Amended Complaint adding defendant W.W. Grainger (“Grainger”). Dkt. 11 (“FAC”).

On February 16, 2012, the Mitchells filed a motion to amend their complaint to add New Werner Holding Co. as a defendant. Dkt. 16. On February 27, 2012, Werner responded. Dkt. 17. On March 1, 2012, the Mitchells replied. Dkt. 21. On March 2, 2012, Werner filed a surreply (Dkt. 23), the Mitchells responded to the surreply (Dkt. 24), and Werner responded to the Mitchells' response (Dkt. 25).

II. FACTUAL BACKGROUND

The Mitchells allege that Mr. Mitchell's employer, EJB Facility Services, Inc. ("EJB"), purchased a ladder from Grainger, Inc. on January 24, 2002 and received the ladder from Grainger, Inc. on January 28, 2002. FAC, ¶ 5.4. On or about April 13, 2009, Mr. Mitchell was an employee of EJB. *Id.* ¶ 5.1. At that time, Mr. Mitchell was working in the course of employment as an electrician at the Naval Submarine Base Bangor. *Id.* ¶ 5.2. As a part of his duties, Mr. Mitchell used the ladder designed and manufactured by Werner and supplied by Grainger. *Id.* ¶¶ 5.3, 5.4. When Mr. Mitchell was on the ladder, the foot of the ladder malfunctioned causing him to fall and suffer injury. *Id.* ¶ 5.6.

The Mitchells claim that, after the deadline for amended pleadings, they learned New Werner Holding Co. purchased all of the assets of Werner Holding Co., Inc. Dkt. 16 at 2. Werner states that, on June 12, 2006, Werner filed for bankruptcy protection and subsequently changed its name to Old Ladder Co., Inc. Dkt. 17 at 3. The Mitchells have submitted an order of a bankruptcy court dated September 24, 2007 that references an asset and purchase agreement dated March 20, 2007 and approved by the bankruptcy court on April 26, 2007. Dkt. 16, Exh. 1. The Mitchells have also submitted a letter from the firm that represents the liquidating trustee of Old Ladder Co., Inc. informing the

1 Mitchells that the bankruptcy cases were open and active and that Werner is afforded all
2 the protections of a bankruptcy action. *Id.*, Exh 2.

3 Werner claims that, on November 14, 2011, the parties exchanged initial
4 disclosures, wherein Werner “identified the documents related to Old Ladder Co.’s
5 bankruptcy proceeding as evidence it would use to support its defense of [the Mitchells’]
6 claims.” Dkt. 17 at 2 (citing Dkt. 18, Declaration of Timothy D. Shea (“Shea Dec.”), Ex.
7 A).

8 III. DISCUSSION

9 A. Motion to Strike

10 Werner moves to strike an exhibit submitted by the Mitchells in support of their
11 motion to amend because it is hearsay. Dkt. 23. Werner, however, has failed to show
12 that the Court must only rely on admissible evidence when considering a motion to
13 amend. Therefore, the Court denies Werner’s motion.

14 B. Motion to Amend

15 “Once the district court had filed a pretrial scheduling order pursuant to Federal
16 Rule of Civil Procedure 16 which established a timetable for amending pleadings that
17 rule’s standards controll[s].” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604,
18 607–608 (1992). “A schedule may be modified only for good cause and with the judge’s
19 consent.” Fed. R. Civ. P. 16(b)(4). “Rule 16(b)’s ‘good cause’ standard primarily
20 considers the diligence of the party seeking the amendment.” *Johnson*, 975 F.2d at 609.
21 The district court may modify the pretrial schedule “if it cannot reasonably be met despite
22 the diligence of the party seeking the extension.” Fed. R. Civ. P. 16 advisory committee’s
23 notes (1983 amendment). If the party seeking the modification “was not diligent, the
24 inquiry should end.” *Johnson*, 975 F.2d at 609. “[C]arelessness is not compatible with a
25 finding of diligence and offers no reason for a grant of relief.” *Id.*
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1 In this case, Werner argues that the Court should deny the Mitchells' motion
2 because the Mitchells

3 make no showing of diligence for the months after being notified that Old
4 Ladder Co. was an insolvent manufacturer and being provided with the
bankruptcy documents showing the acquisition of assets by New Werner
Holdings Co.

5 Dkt. 17 at 7. The Mitchells' attorney states that, when he filed the first amended
6 complaint, he

7 failed to comprehend the corporate structure of the various Werner
8 companies, both those in bankruptcy and those that purchased the assets out
9 of bankruptcy, at the time of the previous motion to amend the complaint to
add parties.

10 Dkt. 22, Declaration of C. Steven Fury, ¶ 2.

11 The Court finds that the Mitchells have failed to show that they were diligent in
12 seeking the schedule modification and/or amendment to account for Werner's bankruptcy
13 proceeding. The Mitchells were on notice of the bankruptcy since August 2011, received
14 documents relating to the bankruptcy in November of 2011, and have previously sought
15 leave to amend their complaint in January 2012. If there would have been some inquiry
16 into the bankruptcy proceeding, the proposed amendment could have been completed
17 well before the deadline or, at the very least, in the first amended complaint.

19 **IV. ORDER**

20 Therefore, it is hereby **ORDERED** that the Mitchells' motion to amend (Dkt. 16)
21 is **DENIED** because they have failed to show good cause to modify the scheduling order

22 DATED this 20th day of March, 2012.

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BENJAMIN H. SETTLE
27 United States District Judge
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